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No. _____

In The

Supreme Court of the United States

October Term, 1995

GARY MCGOWAN

Petitioner,

vs.

METROPOLITAN DADE COUNTY, JOAQUIN G. AVINO, as County Manager for Metropolitan Dade County, METRO-DATE POLICE DEPARTMENT, FRED TAYLOR, ROBERT WINDSOR, PATRICIA MILLIGAN MCCOY,

Respondents.

Petition For Writ of Certiorari
To The Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

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43 pp

Rule 14(a) THE QUESTIONS PRESENTED FOR REVIEW

1. Whether County Government Officials waive their rights to qualified immunity when they enter into a Settlement Agreement and then knowingly breach it and that breach rises to the level of a Constitutional or Federal Law violation.

2. Whether a District Court abuses its discretion, and violates it's Judicial Oath by ignoring controlling case law and pivotal Federal Claims made by the non-moving party to justify granting Summary Judgment to the moving party.

3. Whether the County's claim that its Director of Public Safety (Sheriff) and County Manager are not its final policymakers ranks as an immunity from suit.

Rule 14(b) LIST OF ALL PARTIES TO THE PROCEEDINGS

The names of all parties appear in the caption.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE

The opinion of the Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, is at issue on this appeal. The unpublished Memorandum and Order dated December 23, 1994, granting the Defendants' Motions for Summary Judgment is set forth as Appendix 1 to this Petition.

JURISDICTION OF THIS COURT

The date of the entry of the Eleventh Circuit denial of Respondent's Petition for Rehearing of the judgment sought to be reviewed is January 26, 1996. The Plaintiff has filed its petition for a writ of certiorari within 90 days of denial of that Petition. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The District Court has given rubber stamp approval of the unconstitutional acts of the Defendants in this case.

This case began when McGowan and the County agreed to settle an outstanding Workers' Compensation Claim and a highly questionable termination.[1]

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[1] In an affidavit, witness Debi Greenwood, whom the District Court felt was a "key witness", stated that she has never observed or stated to any Police Officer that she observed McGowan use drugs. The other alleged incriminating witness, to a lesser degree, Mr. Shapiro stated in his transcribed statement to Police that he had never observed McGowan do anything wrong. Both of these facts were presented to and ignored by the District Court without comment.

An Agreement was drafted, negotiated, and forwarded, by the Defendants' Attorney, to the Judge of Workers' Compensation Claims for approval. Pertinent portions of the Agreement were removed by Defendants Attorney prior to submitting the package to the Workers' Compensation Judge, in violation of Florida Law. The Defendants and the District Court have remained silent on this claim.

The Agreement in part called for the Respondents to have the Director of the Metro-Dade Police Department rescind McGowan's termination and have Dade County "expunge" all County records of any mention of McGowan's termination. All County records were to show that McGowan resigned in good standing after 20 years of service. They do not. McGowan was to sign a wavier giving up his rights to a Post Termination Civil Service Hearing, resign from his employment as a Metro-Dade Police Sergeant and sign a release of liability for a job related auto accident. McGowan has carried out all his requirements under the Agreement.

Repeated violations of the Agreement by the Defendants brought to the attention of their Attorney by McGowan was met with negative results. When it was learned that these admitted acts that created the violations had not and could not be corrected, McGowan offered to return all consideration given him in exchange for a Post Termination Civil Service Hearing pursuant to County Ordinance 2-47. The Respondents refused.

On January 11, 1991, McGowan filed a complaint for Breach of a Contract in Circuit Court for Dade County, Florida.

This is no ordinary breach. This breach involved a Settlement Agreement whereby the Plaintiff gave up his right to a Civil Service Hearing, and gave up his employment with the Metro-Dade Police Department, thereby giving rise to the level of a Constitutional or Federal Law Violation and as such is actionable under 42 U.S.C. Section 1983.

On May 27, 1994, Defendants filed a Notice of Removal in the United States District Court for the Southern District of Florida.

Defendants have admitted that performance of the Agreement on their part would violate Florida State Statutes and subject them to removal from office.

These as well as other pivotal issues and case law from this Court, as well as the Eleventh Circuit Court of Appeals, was presented to and ignored by the District Court. Several requests for hearings to point out these issues of fact were, without exception, denied by the District Court without comment.

In addition to the above, the District Court had to make a crucial assumption that is a non-fact in order to justify granting the Defendants Summary Judgment. The District Court found that it was an "undisputed fact" that McGowan's termination was rescinded and he resigned voluntarily. McGowan has vehemently denied that his resignation was rescinded. The County has not responded in any fashion to counter this major claim in McGowan's complaint. The District Court or the Defendants have not and cannot point to anywhere in the record to show who or how McGowan's termination was rescinded.

McGowan signed a resignation document drafted by Respondents' Attorney as part of the Agreement. It was

agreed that McGowan would leave the effective date of his resignation blank until the Respondents complied with all the terms of the Agreement. The Respondents have not and cannot live up to all they promised, explaining why the effective date of the resignation is blank today. The Defendants and the District Court have remained silent on this fact.

With these as well as other disputed material facts in the record before the District Court, Summary Judgment was granted to the County and all claims against the remaining Defendants in their official capacities. The claims against the County Manager were dismissed. All Defendants in their personal capacities were granted qualified immunity. The Breach of Contract claim was remanded back to State Court. The Eleventh Circuit Court of Appeals affirmed without oral argument or comment.

THE ARGUMENT

Each Justice or Judge of the United States shall swear (or affirm) that they will administer justice without respect to persons, and do equal right to the poor and to the rich, and will faithfully and impartially discharge and perform all the duties incumbent upon them as required under the Constitution and laws of the United States. See U.S.C. Title 28, Ch. 21 § 453.

The Framers of the Constitution felt the appointment of judges for life (or during good behavior) would insure that they would remain independent.

Not even the Congress can give a judge the latitude to break their oath, or the Constitution, or a valid law. Congress gave judges "discretion" but this will not and

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cannot be used to cover up a constitutional violation. Nor will it cover up a violation of a valid United States law. If the "discretion" of a federal judge is used to ignore claims of governmental violations of valid United States law or rights guaranteed by the Constitution, it does not fit into the definition of good conduct.

McGowan's rights guaranteed by the Constitution cannot be ignored by the District Court anymore than they can be violated by the Defendants. These rights are not subject to the will of the District Court and the Defendants, they are absolute.

By ignoring pivotal facts in the record the District Court granted Summary Judgment to Dade County and all the remaining Defendants in their official capacities except the County Manager. The claims against the County Manager were dismissed. All Defendants in their personal capacities were granted qualified immunity based primarily on an erroneous assumption that is a non-fact.

Relying on Monell v. Department of Social Services, 436 U.S. 658 (1978) and Brown v. City of Ft. Lauderdale, 923 F.2d 1474 (11th Cir 1991) the Defendants state in their Motion for Summary Judgment that the Plaintiff's Section 1983 claim must be dismissed because McGowan cannot show that the alleged wrong doings set forth in his second amended complaint were the result of any custom or policy attributable to the County's policymakers. In their Motion for Attorneys' Fees the Defendants state that the Plaintiff did not introduce any evidence "that persons with final policymaking authority participated in the alleged unconstitutional acts."

Defendant's presented as fact to the District Court that the Dade County Commission is the sole policymaking

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body for Dade County as it pertains to employment matters.

The lower Court agreed with the Defendants, citing Monell, Bailey v. Board of County Comm's of Alachua County, 956 F.2d 1112 (11th Cir.), cert. denied, 113 S. Ct. 98 (1992) and Dade County Code ch. 2. Art. IV, div. 2 as authority for granting Dade County summary judgment.

The District Court made this determination without considering facts in the Second Amended Complaint as it pertained to McGowan's § 1983 action and the breach of the Settlement Agreement.

Dade County's defense to McGowan's § 1983 action is that Defendant Avino and Defendant Taylor are not final policymakers as it pertains to employment matters within Dade County government.

In Swint et al v. Chambers County Commission, et al, 115 S. Ct. 1203 (1995) this Court gives some guidance if not ruling authority on final policymaking authority as grounds for summary judgment. In Swint, determining that the sheriff was not a policymaker for the County, the 11th Circuit held that the County Commission qualified for summary judgment, reversing the lower Court.

> This Court held: "The County Commission invokes our decision in Monell, which held that municipalities are liable under § 1983 only for violations of federal law that occur pursuant to official governmental policy or custom. Monell, the Commission contends, should be read to accord local governments a qualified right to be free from the burdens of trial..... This argument undervalues a core

> point we reiterated last Term: 'Section 1291 requires courts of appeals to view claims of a "right not to be tried" with skepticism, if not a jaundiced eye. The Commission's assertion that Sheriff Morgan is not its policymaker does not rank, under our decisions, as an immunity from suit. Instead, the plea ranks as a mere defense to liability."

In any event, Avino and Taylor do have final policymaking authority as it pertains to hiring and firing employees from the Metro-Dade Police Department. Dade County operates under a charter that establishes a "commission-manager" form of government. The charter grants the Board of County Commissioners general legislative and policymaking authority. The County Manager serves as the County's chief executive officer and head of the administrative branch of county government. The charter authorizes the County Manager to create and administer all units of county government under the Manager's jurisdiction. The Metro-Dade Police Department is within the jurisdiction of the County Manager and its head, the Director of Public Safety, reports to the County Manager. See Lawrence v. Metro Dade County, 872 F. Supp. 957 U.S. Dist. S.D.F.(1994).

The Dade County Commission *cannot by law* review a decision by Defendant Avino to uphold the dismissal or the rescission of a dismissal of an employee by Defendant Taylor. See Dade County ordinance Sec. 3.05. Dade County Code 2-47.1 governs the review of the

County Manager's decision in disciplinary actions in Dade County.

The District Court subsequent to this case has apparently changed it's position. The Court ruled in a case involving a curfew that was implemented by the County Manager in Dade County. The District Court held that the actions of the County Manager was not subject for review and as such acted with final policymaking authority. See Smith v. Avino, 866 F. Supp. 1399 (S.D.F. 1994). As in the instant matter, the County Manager's decision was not subject for review. This was pointed out to the District Court who ignored it without comment.

Additionally, as admitted by the Defendants Attorney, when Dade County entered into the Settlement Agreement with McGowan, it bound all defendants to that agreement and any violation of that agreement by any one of the Defendants is a violation by Dade County. When Dade County through Defendant Taylor and Defendant Avino entered into the Settlement Agreement they waived their rights to qualified immunity. Its important to note that in deposition the Attorney who represented Dade County in the negotiation of the Settlement Agreement stated that it was by the authority of Defendant Taylor that she was entering into the Agreement. Certainly the Defendants Attorney was in constant contact with and keeping all the Defendants (Clients) abreast of the situation.

Defendant Taylor has breached the Agreement in a way that has not and cannot be corrected. Prior to his actions, McGowan put him on notice that his actions if carried out would be in direct violation of the Settlement

Agreement. In fact, all Defendants have at one time and in varying degrees breached the Agreement.

The District Court has stated by it's ruling that a local government can, through its employees, negotiate and enter into a Settlement Agreement without ever being held accountable for breaching that Agreement in Federal Court. Additionally, any agent of the County, could knowingly and intentionally violate the Agreement and receive qualified immunity for their actions. The Congress never intended for Summary Judgment and Qualified Immunity to be used in this manner. If agents of a government negotiate and enter into a Settlement Agreement whereby a citizen bargains away his Constitutional Rights, then those agents and the government have waived their rights to any immunity if they intentionally breach that Agreement. The only case law found is from the Eleventh Circuit in Washington v. Kirksey, 811 F.2d 561 where the Court held:

> "When state officials enter into a settlement agreement by which a state employee relinquishes his right to a hearing required by the due process clause of the fourteenth amendment, due process is violated when the state totally breaches the settlement agreement."

This is exactly the same set of facts contained in the record of this case that the Defendants have remained silent about and the District Court has ignored.

All the documents making up the Agreement were given to the Defendants Attorney for submission to the

Judge of Compensation Claims for approval. Florida Law requires that a Workers' Compensation Settlement Agreement be approved by the Judge of Compensation Claims before it becomes final and enforceable and prior to the approval of any agreement the parties Attorneys shall submit to the judge all evidence material to the consideration and disposition of the settlement agreement. See Rogers v. Concrete Sciences, Inc., 394 So. 2d 212 (Fla. 1st DCA 1981); Florida W.C.R.P. 4.131(d). As admitted in deposition, these documents were valuable consideration for the Workers' Compensation Settlement Agreement. Dade County's Attorney, removed the wavier and resignation from the package prior to submission to the Judge of Compensation Claims. The waiver clearly states in the first paragraph that it was consideration for a Workers' Compensation Settlement Agreement. This leaves no doubt that it was consideration for the Settlement Agreement. Ms. Anderson, drafter of the Agreement, stated in deposition that the waiver and resignation were required or else there would have been no Agreement, certainly making these documents material consideration to the Agreement, and as such should have been submitted to the judge. The Defendants have remained silent on this and the District Court has ignored it.

The Defendants have admitted and the District Court has found that the Plaintiff waived his right to a Civil Service Hearing and signed a resignation form as consideration to secure the Settlement Agreement.

The Defendants have admitted forwarding the investigative file as well as an affidavit of termination to the State Standards Commission. This is a direct violation of

the Settlement Agreement. This was pointed out to the District Court who ignored it.

The State refuses to change or expunge the inaccurate and stigmatizing records sent to them by the Defendants and have subsequently made them available to the public.

The County's Attorney represented to McGowan that they had the authority to do what the Agreement required of them. McGowan believed these representations and relied upon these representations as an inducement to enter into the Agreement.

The Plaintiff's career or chances of ever being employed as a Police Officer have been permanently foreclosed because of the Defendants breach of the Settlement Agreement. State law requires any Police Agency before hiring an Officer or Deputy obtain from the Florida Commission any background investigation information. (F.S. 943.139 (1) (2) (3) 1993, 1995). As stated by Director Smith at a State Commission meeting:

"Certainly the background investigation is there for anyone that might subsequently want to employ him."

The Defendants have not submitted any affidavits to contravert numerous pivotal claims contained in McGowan's complaint[2]

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[2] Under Madara v. Hall, 916 F. 2d 1510, 1514 (11th Cir. 1990), a district court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the Defendants' affidavits. Where the Plaintiff's complaint and the Defendants' affidavits conflict, the district court must construe all reasonable inferences in favor of the plaintiff.

The Defendants carefully chose which claims and issues to address in the District Court, remaining silent on those federal claims where no defense existed. The District Court ignored the numerous documents submitted by the Plaintiff pointing to the record where these claims were present.

These were not frivolous claims without supporting documentation. The Plaintiff backed up his claims with affidavits, depositions, State Law, Federal Law, and current controlling case law from this Court as well as the Supreme Court.

Even admission made in depositions and motions that were unfavorable to the Defendants that were pointed out to the District Court in the Plaintiff's responses were completely ignored.

Summary Judgments serve a real and valuable purpose. Their fundamental purpose is to relieve the litigant and an overburdened Court from the trial of unnecessary lawsuits. However, it must first be determined that the movant has successfully met his/her burden of proving a negative, i.e. the non-existence of a genuine issue of material fact. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party. The Defendants have not met their burden in this case. Defendants have remained silent on numerous pivotal issues in this case. The Plaintiff came forward with affidavits, depositions and other evidence to support his case. The District Court's granting of Summary Judgment in this case is clearly inappropriate and a manifest injustice.

Contradicted evidence in the record was determined as being "uncontradicted" by the District Court. The District Court determined that the Plaintiff's resignation

was rescinded and he resigned, by basing that determination on what the Court called "uncontradicted evidence in the record". The District Court had to reach way beyond acceptable discretion to arrive at this conclusion.

The Plaintiff has vigorously denied that Dade County has rescinded his termination. Contrary to the District Court's claimed uncontradicted factual finding, the record herein is devoid of any evidence that any Dade County official has to this date rescinded the Plaintiff's termination. *In fact, the Defendants have never addressed or defended this claim by the Plaintiff in the District Court despite the fact that it is a major claim in the Second Amended Complaint.*[3]

In deposition, the Director of the Metro-Dade Police Department stated that he did not rescind the Plaintiff's termination. He further stated that the only person with authority to override his decision is the County Manager, and to the best of his knowledge this was not done in this case. Adding that the normal procedure in a case where the County Manager does override his decision it is always followed by a notice to him. The Defendants

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[3] The party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes v. S. H. Kress & Co., 398 U.S. at 160, 90 S. Ct. at 1609-10; Marsh, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. Brunswick Corp. v. Vineberg, 370 F.2d 605, 611-12 (5th Cir. 1967). See Dalke v. Upjohn Co., 555 F.2d 245, 248-49 (9th Cir. 1977)".

declined to address the above issues and the District Court completely ignored them.

The District Court erroneously determined a non-fact to justify the major portion of the order granting the Defendants' Qualified Immunity and Summary Judgment and as such abused it's discretion.[4]

As it pertains to Summary Judgment, "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Taylor v. Ledbetter, 818 F.2d 791, 794 n. 4 (11th Cir.1987) (en banc), cert. denied, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 808 (1989) (quotation omitted). The evidence must be viewed in the light most favorable to the non-moving party. The Plaintiff's version of any disputed issue of fact is presumed correct for the purpose of Summary Judgment. See Arizona v. Maricopa County Medical Society, 457 U.S. 332, 339, 102 S. Ct. 2466, 2470, 73 L.Ed.2d 48 (1982). The burden is on the movant to demonstrate conclusively that the nonmoving party cannot prevail.

In addition to written responses, depositions, and affidavits, the Plaintiff submitted two separately filed motions asking the District Court to reconsider some clearly erroneous findings and consider new evidence in the form of an affidavit and new case law. Both motions were denied without explanation.

The District Court's granting of Summary Judgment to the Defendants was improper in light of the facts contained in this case and controlling case law. This

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[4] The District Court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the Defendants' affidavits.

case should be remanded to an unbiased District Court for resolution.

Respectfully Submitted by:

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

Case No. 94-1061-CIV-MOORE

GARY MCGOWAN,

Plaintiff,

vs. **MEMORANDUM ORDER**

METROPOLITAN DADE COUNTY,
JOAQUIN AVINO, as County Manager
for Metropolitan Dade County,
METRODADE POLICE DEPARTMENT,
FRED TAYLOR, ROBERT WINDSOR,
and PATRICIA MILLIGAN MCCOY,

Defendants.
_____/

THIS CAUSE came before the Court upon Defendants' motions for summary judgment (DE 14, 27). Having reviewed the record, considered the argument of counsel, and been advised on the premises, the Court GRANTS Defendants' motions for the reasons discussed below.

I. Factual Background[1]

Plaintiff/Gary McGowan formerly was employed as a police officer with Defendant MetroDade Police Department ("MetroDade"). MetroDade initiated an internal affairs investigation of McGowan after receiving a complaint that he was using illegal narcotics while off duty.

Sergeant Patricia Milligan McCoy interviewed and took statements from numerous witnesses in the course of this inquiry. A key witness was Debbie Greenwood, the person who had initially complained of McGowan's alleged activities. Greenwood reported observing McGowan use cocaine 30 to 40 times with her ex-husband, William Fleming. According to Greenwood, Fleming was a narcotics dealer whose home McGowan had often visited to use cocaine. Greenwood stated that McGowan had once given Fleming $50 to $60 in exchange for cocaine and, on another occasion, had asked Fleming to join him in a cocaine conversion laboratory venture.

On July 25, 1988, Milligan submitted to MetroDade's Internal Affairs Unit Disposition Panel (the "IAU Panel") an exhaustive 89-page report of her investigation that largely confirmed the allegations made against McGowan. The report recounted statements given by over twenty witnesses, set forth a formal statement given by McGowan in his defense of the charges against him, and identified various official records and documents that the report had relied upon.

The IAU Panel issued its disposition of the charges against McGowan on September 27, 1988. The IAU Panel

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[1] The following facts are drawn from uncontradicted evidence in the record.

concluded that McGowan had been a close associate of a known drug dealer, William Fleming, and had used cocaine 30 to 40 times in Fleming's residence.

As a result of the IAU Panel's findings, MetroDade's Director, Defendant Fred Taylor, terminated McGowan's employment on October 26, 1989. McGowan requested an appeal of his termination. A hearing for this purpose was scheduled for January 4, 1990 and later was rescheduled to February 2, 1990. Before this hearing was held, however, McGowan entered into a settlement agreement with Dade County which resolved a pending workers' compensation claim that McGowan had been pursuing. Under the terms of this settlement (the "Settlement Agreement")[2] , Dade county paid McGowan $87,00O in exchange for a release of all claims and a covenant not to sue Dade County rescinded McGowan's termination, and McGowan voluntarily resigned from MetroDade. Dade County also promised to remove all information related to McGowan's dismissal from McGowan's personnel file. As a consequence of the Settlement Agreement, McGowan's appeal hearing was canceled.

On May 30, 1990, MetroDade forwarded its internal affairs investigation file for McGowan and an affidavit of termination to the State of Florida's Division of Criminal Justice Standards and Training Commission (the

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[2] The terms of the Settlement Agreement are set forth in several documents, including a joint petition for lump settlement and release of all claims for compensation, an affidavit of release of all claims, a waiver of rights, and correspondence between the parties.

"Florida Commission"). The affidavit of termination incorrectly exhibited a code for termination rather than a code for voluntary resignation. When MetroDade learned of this error, it informed the Florida Commission that McGowan had voluntarily resigned and had not been terminated.

After reviewing McGowan's internal affairs file, the Florida Commission impaneled a probable cause panel to investigate McGowan. After that panel found that there was probable cause to charge wrongdoing, the Florida Commission issued an administrative complaint against McGowan on November 19, 1991.

The Florida Commission later voluntarily dismissed this complaint because it could not locate witnesses that it believed were essential to its case.

During the pendency of this administrative complaint, McGowan filed suit in state court against Defendants for breach of the Settlement Agreement. After McGowan amended his complaint to add a federal civil rights claim, Defendants removed the case to this Court. [3]

II. Discussion

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, it any, show

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[3] McGowan also filed a separate state action against Defendants petitioning for writ of mandamus. McGowan's petition complained that MetroDade had denied him a hearing in which he could challenge his termination. The state court denied the petition, and McGowan has appealed this decision to a state appellate court.

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To obtain summary judgment, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In assessing whether the movant has met this burden, the Court views the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Id.

B. Section 1983 claims[4]

Counts III and IV of the Second Amended Complaint assert civil rights claims against Defendants under 42 U.S.C. S 1983 for violating McGowan's procedural due process rights.[5] These claims allege

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[4] McGowan's complaint does not label its separate claims as "counts. " For convenience, the Court shall refer to the Second Amended Complaint's claim for "breach of contract" as count I, Second Amended Complaint at ¶¶ 17-21, the claim for "specific performance" as count II, id. at ¶¶ 22-24, the claim for "violation of due process" as count III, id at ¶¶ 25-28, and the claim under "section 1983, Title 42 USC" as count IV, id. at ¶¶ 29-33.

[5] Counts III and IV partly predicate their section 1983 claims on Defendants' alleged violation of articles 1 and 9 of the Florida Constitution. Alleged violations of state law are not cognizable under section 1983, however. Conloaue v. Shinbaum, 949 F.2d 378, 380-81 & n.5 llth Cir. 1991), cert. denied, 113 S. Ct. 123 (1992).

The Second Amended Complaint also suggests the investigation and termination of McGowan violated substantive due process. Second Amended Complaint at s 25. Violations of employment rights and interests do not implicate substantive due process, however. McKinney v. Pate, 20 F.- ~ 1550, 1560 (llth Cir. 1994) (en banc).

constitutional defects in the investigation and termination of McGowan.[6] Defendants seek summary judgment on defenses specific to each Defendant.

1. Dade County

Dade County contends that it cannot be held liable under section 1983 because it is a county government. A county cannot be held liable for its employees' acts under a theory of respondeat superior. Monell v. Department of Soc. Serv. of the City of New York, 436 U.S. 658, 691 (1978); Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1125 (llth Cir.), cert. denied, 113 S. Ct. 98 (1992). Instead, county liability "must be founded on an official policy or custom." Bailey, 956 F.2d at 1125.

A county's "official policy or custom" is not limited to decisions made by its governing body or the county's written agreement. Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1480 (llth Cir. 1991). County policy or custom also can take the form of (1) an isolated act by a county employee who has "final policymaking authority" with respect to that act, id., or (2) a widespread county practice that, although not authorized by written law or express county policy, is so permanent and well settled as to constitute a custom or usage with the force of law." Id. at 1481.

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[6] In Kamenesh v. City of Miami, 772 F. Supp. 583, 588-89 (S.D. Fla. 1991), this Court recognized that Florida law was sufficiently unclear as to whether a police officer had a legitimate expectation of entitlement to continued employment to overcome summary judgment on the question of whether he or she possessed a property interest in continued employment.

McGowan has failed to adduce evidence indicating that the alleged deprivation of his rights resulted from an official policy or custom. Specifically, there is no evidence in the record that Dade County has engaged in a widespread practice of depriving police officers of their procedural rights in internal police investigations or in the termination of officers' employment .

Nor is there evidence that persons with final policymaking authority participated in the alleged unconstitutional acts. In Bailey, a prison guard had brought a section 1983 claim against Alachua County for suspending him without pay and maintaining stigmatizing information in his personnel file without first providing him with a hearing. 956 F. 2d at 1118. The district court dismissed these claims, and the Eleventh Circuit affirmed. Explaining its decision, the Court of Appeals stated that the record was "devoid of evidence that [the individuals charged with violating the plaintiff's rights] had 'final policymaking authority' for Alachua County's personnel policy. Testimony at trial was unequivocal that final policymaking authority rested in the Board of County Commissioners." Id. At 1125.

Bailey is indistinguishable from the present case. The Dade County Code endows the Dade County Commission with final policymaking authority over county employment practices. See Dade County Code ch. 2, art. IV, div. 2.[7] The Dade County Commission did not participate in the investigation or termination of McGowan. Following a , then, the Court grants summary judgment in

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[7] McGowan has offered no evidence to contradict this proposition.

favor of Dade County for the section 1983 claims raised in counts III and IV.[8]

2. MetroDade

MetroDade seeks summary judgment on the ground that it is not an entity subject to suit.

"Sheriff's departments and police departments are usually not considered legal entities subject to suit." Dean v. Barber, 951 F.2d 1210, 1214 (llth Cir. 1992). The "capacity to sue or be sued shall be determined by the law of the state in which the district court is held." Id.

This Court has concluded that the Miami and Fort Lauderdale police departments are not legal entities subject to suit under section 1983. Post v. City of Fort Lauderdale, 750 F. Supp. 1131, 1133 (S. D. Fla. 1990) (cited approvingly in Dean, 951 F.2d at 1214); Eddy v. City of Miami, 715 F. Supp. 1553, 1556 (S.D. Fla. 1989). Following these cases, this Court concludes that MetroDade is not a legal entity subject to suit. Summary judgment thus is granted against McGowan's section 1983 claims against MetroDade.

3. Individual Defendants

Counts III and IV allege wrongdoing by individual Defendants Robert Windsor, Patricia Milligan McCoy and

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[8] Because a suit against a county official in his or her official capacity is in effect a suit against the county itself, summary judgment also is granted against McGowan's section 1983 claims against the individual defendants in their official capacities. Busby v. City of Orlando, 931 F.2d 764, 776 (llth Cir. 1991). Since Joaquin Avino is sued only in his official capacity, McGowan's section 1983 claims against him are dismissed .

Fred Taylor. The individual Defendants seek summary judgment on the basis of qualified immunity .

a. Qualified immunity standards

"Qualified immunity for government officials is the rule, liability and trials for liability the exception." Alexander v. University of North Florida, 39 F. 3d 290, 291 (11th cir. 1994). "Qualified immunity protects government officials performing discretionary functions from civil . . . liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." Lassiter v. Alabama A & M Univ., 28 F. 3d 1146, 1149 (llth Cir. 1994) (en banc) (quotation omitted). Since there is no dispute that Defendants were performing discretionary functions in the course of committing their alleged wrongdoings, they may assert qualified immunity.

To overcome this immunity, McGowan must make two showings: first, that Defendants' actions violated one of his constitutional rights; and, second, that the law protecting these rights was 80 clearly established at the time of Defendants' conduct that Defendants reasonably must have known that their actions were illegal. See Caraballo-Sandoval v. Honsted, 35 F.3d 521, 524 (llth Cir. 1994). The second requirement imposes a heavy burden on McGowan. To demonstrate the existence n
established law, he:

> cannot point to sweeping propositions of law and simply posit that those propositions are applicable. Instead, [he) must draw the court's attention toward a more particularized and fact-specific inquiry showing that there existed

> sufficient case law establishing the contours of his or her constitutional rights such that the unlawfulness of the [Defendants'] conduct would have been apparent to a reasonable official in the same circumstances.

Belcher v. City of Foley, 30 F. 3d 1390, 139S (llth Cir. 1994) (quotation omitted). "When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar." Id. (quotation omitted). "For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [thel defendant is doing violates federal law in the circumstances." rd. (quotation omitted).

b. Robert Windsor

McGowan contends that Windsor violated his procedural due process rights by being "actively involved and supervising the investigation that he was reviewing." Second Amended Complaint at 1 30. Windsor was a member of the IAU Panel that reviewed McCoy's investigation. McGowan alleges that Windsor assisted McCoy in this investigation[9] and concludes, [c]ertainly due

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[9] Specifically, McGowan asserts that Windsor "was in charge of the Internal Affairs Bureau of Metro-Dade Police Department and was kept in constant communication and updated on the investigation of Plaintiff." McGowan's Response to Individual Defendants' Motion at 3.

process requires that . . . one's investigator [not] be also one's judge." McGowan's Response to Individual Defendants' Motion for Summary Judgment at 11.

Windsor's review of an investigation that he may have participated in did not contravene federal law. In administrative adjudications, "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation." Withrow v. Larkin, 421 U.S. 35, 58 (1975). The mere fact that Windsor may have worn both prosecutorial and adjudicative hats thus is insufficient to abridge his qualified immunity. Id.; Hastings v. Judicial Conf. Of the United States, 829 F.2d 91, 104-05 (D.C. Cir. 1987); Brasslett v. Cota, 761 F.2d 827, 837 (1st Cir. 1985). McGowan has adduced no specific evidence indicating that Windsor was predisposed against McGowan to an extent rendering him unfit to serve on the IAU Panel. See Bass v. Citv of Albany, 968 F. 2d 1067, 1069-70 (llth Cir. 1992). Summary judgment in favor of Windsor on count IV's section 1983 claim thus is warranted on the basis of qualified immunity.[10]

c. Patricia Milligan McCoy

McGowan alleges several claims against McCoy arising out of her investigation of McGowan's alleged drug use.

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[10] A separate defect in McGowan's claim against Windsor is that Florida law permits McGowan to seek redress in state court for a decision-maker's bias in employee discipline proceedings. McKinney, 20 F.3d at 1562-67. Unless McGowan can show that this remedy is inadequate, his due process "bias" claim cannot survive summary judgment. See id.

(1) Use of fraudulent material

McGowan's complaint alleges that McCoy "used fraudulent and inaccurate and material" in her investigation report. Second Amended Complaint at ¶ 30. During her investigation, McCoy took statements from Debbie Greenwood and Robert Shapiro. McGowan alleges that these individuals had failed two lie detector tests and therefore were not credible witnesses. He thus suggests that McCoy violated his constitutional rights by submitting Greenwood's and Shapiro's statements to the IAU Panel. McGowan's Response to Individual Defendants' Motion at 13.

In Dees v . City o Miami, 747 F. Supp. 679 (S.D. Fla. 1990), a police officer ("Dees") was arrested for perjury as a result Or statements he had made during an investigation of the shooting Or a citizen. Investigators determined that Dees had perjured himself after another officer had confessed to firing a shotgun at the citizen's car and agreeing with Dees to cover up the shooting. Dees later sued the investigators under section 1983, challenging his arrest as lacking probable cause. Dees claimed that investigators should have known that the confession identifying him had been coerced and, therefore, was unreliable.

The district court entered summary judgment in favor of the investigators on the basis of qualified immunity. Although the investigators assertedly had threatened the confessing officer that his failure to cooperate could jeopardize his employment and cause him to risk imprisonment, the court concluded that this evidence was, as a matter of law, insufficient to preclude a

reasonable person from relying on the confession to arrest Dees. Id. at 686.

As in Dees, Greenwood's and Shapiro's alleged failure of lie detector tests did not render their testimony so incredible that McCoy should not have relied upon it in her report. Both Greenwood and Shapiro had close ties to Fleming and were aware of his narcotics dealing. The two witnesses provided specific testimony about Fleming's drug dealing, and Greenwood provided particularized facts linking McGowan to Fleming. Under these circumstances, the witnesses were sufficiently credible to permit McCoy to use their testimony despite negative lie detector test results. Id. McCoy's use of this testimony thus did not abridge McGowan's due process rights.

Further, even if McCoy should not have used Greenwood's and Shapiro's testimony, McGowan has not cited to any case which would have put McCoy on clear notice that such conduct was unlawful. This Court has been unable to find such a case through its own research. McCoy thus did not violate any "clearly established" law in relying on Greenwood's Shapiro's testimony.

(2) Withholding of exculpatory material from the IAU Panel

The complaint alleges that McCoy "withheld exculpatory material from the Review Panel." Second Amended Complaint at s 30. Although it is not entirely clear, it appears that this claim is based on McGowan's assertion that McCoy "knew that witnesses failed lie detector test s and . . . didn't submit this information" to the IAV Panel. McGowan's Response to Individual Defendants' Motion

This claim is barred by qualified immunity. First, McCoy was under no obligation to turn over to the IAU Panel any material that was potentially exculpatory of McGowan. See Lee v. Hutson, 810 F.2d 1030, 1033 (llth Cir. 1987) (no substantive due process violation where exculpatory information not turned over in discharge hearing)." Second, McGowan has not identified any case establishing a "bright-line" rule[12] requiring investigators like McCoy to make Brady-like disclosures in administrative termination proceedings. See Brady v. Maryland, 373 U.S. 83 ('963). McGowan has thus failed to establish that McCoy violated a clearly established law by failing to inform the IAU Panel of Greenwood's and Shapiro's alleged failure of lie detector tests.

(3) Allowance of persons under separate investigation to investigate McGowan

The Second Amended Complaint alleges that McCoy wallowed persons themselves under investigation to participate in [the McGowan) investigation.[11] Second

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[11] Lee suggested, without deciding, that procedural due process might be violated if state law provided no mechanism for addressing a government employer's failure to divulge exculpatory information. 810 F. 2d at 1033. The court found Georgia law did provide such a mechanism, however, through a state court's "substantial evidence" review of an employee's discharge. Id. & n.4.

This Court believes that the Eleventh Circuit, if it had to decide the question left unanswered in Lee, would conclude that procedural due process does not impose Brady disclosure requirements in employment termination proceedings. After all, if Brady-style disclosures were required is such proceedings, why should they not be required in all other civil actions involving a government entity, including state and federal court actions?

Amended Complaint at ¶ 30. Elaborating on this claim, McGowan states that McCoy "utilized the services of the South Narcotics Unit, which itself was under investigation by the Federal Government, and some of whom have been subsequently charged or indicted [,] and utilized material they provided to her." McGowan's Response to Individuals' Motion at 14.

McGowan has provided no explanation how this fact could have deprived him of due process, nor can the Court fathom one on its own. Further, McGowan has identified no case clearly establishing that officers under investigation cannot assist the investigation of a another officer. Consequently, McCoy is entitled to qualified immunity on this claim.

(4) Violation of Police Officer's Bill of Rights

The Second Amended Complaint alleges that McCoy violated McGowan's rights under the Police Officer's Bill of Rights (the "POBR"), Fla. Stat. Ann. §§ 112.531-112.534. Second Amended Complaint at ¶¶ 25, 30. McGowan does not identify the specific POBR rights he believes McCoy violated.

Whatever McGowan's claim is, it indisputably fails to establish a triable issue of fact as to whether his due process rights were violated. The POBR provides an

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However, even if Brady disclosures were required, procedural due process would not be violated in this case because, as in Lee, McGowan was provided an opportunity to challenge his discharge in a post-termination appeal hearing. See Dade County Code ch. 2, art. IV, div. 2, § 2-47.

[12] See Rodgers v. Horsley, 39 F.3d 308, 311 (11h Cir. 1994) (pre-existing case law must establish "bright line").

officer with two types of procedural rights during an investigation of alleged wrongdoing: (1) a state employer is limited in the manner it may "interrogate the officer in the course of its investigation, id. at § 112.532(1), and (2) the officer is entitled to notice of the reasons for a disciplinary action prior to the implementation of that action, id. at § 112.532(4). Neither the Second Amended Complaint nor McGowan's responses to Defendants' motions for summary judgment suggest that McGowan was improperly interrogated. Further, the undisputed evidence - namely, the October 26, 1989 notice of dismissal -- demonstrates that McGowan received appropriate, timely notice of the reasons for his dismissal.[13] McCoy thus is entitled to qualified immunity on this section 1983 claim.

d. Fred Taylor

Counts III and IV raise various claims against an unnamed Defendant which neither the Second Amended Complaint nor McGowan's pleadings or other papers identify clearly. However, given the nature of these claims, the unnamed Defendant appears to be Fred Taylor.

(1) Failure to provide post-termination hearing

McGowan contends that he was deprived of an appeal hearing to review his dismissal. Second Amended Complaint at ¶ 26. He asserts that such a hearing should have occurred within 60 days of the notice of his dismissal.

The flaw in this claim is obvious: McGowan's termination was rescinded prior to his scheduled post-termination appeal hearing. After the discharge was

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[13] Further, it was Taylor, not McCoy, who sent the October 26 notice.

rescinded, McGowan's appeal of his discharge became moot. Taylor (or anyone else) thus committed no due process violation by canceling the February 2, 1990 post-termination hearing. He (and anyone else) thus is entitled to qualified immunity on this claim.

(2) Failure to provide opportunity to respond to adverse information

The Second Amended Complaint suggests that Taylor violated McGowan's due process rights by not proving him an opportunity to confront the allegedly fraudulent material submitted against him. Second Amended Complaint at ¶¶ 25, 32.

The undisputed evidence demonstrates that McGowan received adequate opportunity to rebut the evidence that MetroDade relied upon to terminate him. McGowan was entitled to appeal his termination in a posttermination hearing, Dade County Code ch. 2, art IV, div. 2, § 2-47, and MetroDade honored this right by scheduling the February 2, 1990 hearing. Had McGowan gone forward with his appeal, he could have introduced evidence, compelled the attendance of witnesses, and challenged the grounds for his termination. Id. The availability of such a hearing gave McGowan an adequate opportunity to respond to the charges against him and, therefore, afforded due process. See Campbell v. Pierce County, 741 F.2d 1342, 1345-46 (llth Cir. 1984).[14]

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[14] McGowan does not contend that he was entitled to such a hearing before he was terminated. Even if he had raised this claim, however, it would be defeated by qualified immunity. In Bailey, the Eleventh Circuit held that, for the purpose of applying qualified immunity, the law was not clear as of 1992 as

McGowan's claim thus cannot overcome Taylor's (or anyone else's) qualified immunity on this issue.

(3) Failure to provide name-clearing hearing

The Second Amended complaint last suggests that Taylor failed to provide McGowan with a name-clearing hearing prior to sending derogatory information, located in his internal affairs file, to the Florida Commission. Second Amended Complaint at ¶¶ 25, 32; McGowan's Response to Individual Defendants' Motion at 7-10.

Such a claim implicates McGowan's liberty interests under the Due Process Clause, In Buxton v. City of Plant City, 871 F.2d 1037 (llth Cir. 1989), a municipality terminated an employee and placed adverse information relating to his termination in his personnel file and in an internal affairs report. The employee sued under section 1983, arguing that the insertion of this information in these records deprived him of liberty without due process because he had lacked an opportunity to dispute the adverse information in a hearing. The Eleventh Circuit agreed. It held that, where a government employee is discharged on the basis of false, "stigmatizing" information, the employee has a right to a "name-clearing" hearing to challenge that information prior to its publication. Id. at 1042-43, 1046. The court concluded that the defendants had published the stigmatizing information when they had placed it in the plaintiff's employment records. Id. at 1045-46.

A key fact distinguishes the instant case from Buxton: McGowan's termination was rescinded shortly

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to whether a correctional facility's guard was entitled to a hearing before his discharge. 956 F. 2d at 1122-25.

after it was issued, and McGowan then voluntarily resigned. Unaccompanied by a termination or other involuntary change in McGowan's employment status, the dissemination of false information about McGowan in the internal affairs file could not have deprived McGowan of a liberty interest. In Paul v. Davis, 424 U.S. 645 (1976), two chiefs of police disseminated approximately 800 leaflets to business owners in Louisville, Kentucky, listing several persons as "active shoplifters." Each "active shoplifter" was identified by his or her name and accompanying "mug shot" photos. The plaintiff was one of the persons listed on the leaflet, and he sued the police chiefs for disseminating stigmatizing information about him without giving him a prior hearing. The police chiefs responded that their action had not deprived the plaintiff of any cognizable liberty interest.

The Supreme Court agreed with the police chiefs. The Court found that a state's dissemination of stigmatizing information does not, by itself, deprive an individual of a liberty interest, even if the information damages the individual's reputation. Id. at 711-12. In order to implicate a person's liberty interest, the Court held, defamatory information must be publicized in the course of the state's alteration or extinguishing of a right or status held by the individual Id. Since the police chiefs had merely defamed the plaintiff without altering or extinguishing any right or status that he held, their dissemination of stigmatizing information could not have constituted a due process violation.

The Eleventh Circuit has interpreted Paul as creating a "stigma-plus" test for determining whether a state' s defamatory statements infringe upon individuals'

liberty interests: an infringement occurs when the defamation is stigmatizing and the state has also diminished some right or status held by the individual. Von Stein v. Brescher, 904 F.2d 572, 580-84 (llth Cir. 1990). Applying this test, the Eleventh Circuit has held that a state's dissemination of derogatory information about an employee without a termination of that person's employment does not infringe upon the person's liberty interest-. In Faucher v. Rodziewicz, 891 F.2d 864 (llth Cir. 1990), the director of anesthesiology in a public hospital circulated a memorandum instructing doctors not to employ a certain staff anesthesiologist without first providing 24-hours' prior notice to the director. The anesthesiologist filed suit under section 1983, alleging that the director's memorandum caused a dramatic drop in the number of surgeons using her services. She claimed that the director violated her due process rights by publishing the stigmatizing memorandum without a prior hearing.

The district court granted summary judgment in favor of the defendant director, and the Eleventh Circuit affirmed. Finding that the anesthesiologist had not been terminated and that her staff privileges had not been suspended, the Court of Appeals held that stigmatic effect of the memorandum had not been accompanied by an alteration or loss of the anesthesiologist's rights or status. Id. at 870. Consequently, the dissemination of the memorandum could not constitute a due process violation.

As in Faucher, Defendants did not ultimately terminate McGowan's employment status. Although MetroDade's Director originally discharged him, that discharge was rescinded; and it was McGowan himself who

changed his employment status by voluntarily resigning.[15] Consequently, to the extent that Defendants published derogatory information about McGowan, they did so without altering McGowan's employment status. In other words, McGowan suffered a "stigma" but no "plus." Defendants thus did not infringe upon McGowan's liberty interests and were not obliged to provide him with a name-clearing hearing.

Consequently, Taylor (and anyone else) is entitled to qualified immunity on this issue.

III. Conclusion

Defendants have demonstrated that no genuine issue of material fact exists as to their defenses to section 1983 liability. The Court thus awards summary judgment in favor of all Defendants on the section 1983 claims alleged in counts III and IV.

The Court also declines to exercise its pendant claim jurisdiction over-the remaining state claims.[16] These claims were pending in state courts for over three years, and they were removed to this Court only recently when McGowan added his section 1983 claims. Consequently, the Court remands the remainder of this cause to the circuit court of 11th Judicial Circuit in and for Dade County, Florida.[17]

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[15] McGowan concedes that he voluntarily resigned in his Second Amended Complaint. Second Amended Complaint at ¶ 6.

[16] Defendants also have filed a counterclaim alleging a state law cause of action.

[17] Defendants also seek summary judgment on all counts because McGowan had failed to serve the Second Amended Complaint on

THIS CASE is CLOSED.

DONE AND ORDERED in Chambers in Miami, Florida this 23rd day of December, 1994.

/s/ K M Moore
K. Michael Moore
UNITED STATES DISTRICT JUDGE

copies provided:
Michael L. Von Zamft, Esq.
William X. Candella, Esq.

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then. This objection now is moot because McGowan has effected service.